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would receive the unqualified approval of the President of the United States. That being so, the mere form in which the order was addressed to Admiral Skerrett seems to be a matter of no serious consequence.

"The control given to Mr. Trist over the military operations in Mexico, when war was flagrant, was far greater than that which was confided to Mr. Blount."

FACTS WHICH ARE SAID TO PREVENT WORDS
CREATING A SEPARATE USE FROM HAVING
THAT EFFECT.

By R. C. McMURTRIE, LL.D.

The decision of the Supreme Court of Pennsylvania in July last, in the case of *McConnel v. Wright*, 150 Penn. Rep. 275, must be most carefully considered by conveyancing counsel of that State. Its importance can scarcely be over-estimated, not only as to wills and settlements in the future, but as to all wills in the past. As exhibiting a peculiar development of the law it is of interest to the profession everywhere.

It is not proposed to criticise, for that is useless and possibly unbecoming, but there must be suggestions made that may assume the form of criticism, or be thought to do so, in the effort to make the point of the case clearly understood. For it is impossible to appreciate the effect of the decision without considering the grounds assigned for the judgment and their relative importance in ascertaining what is the precise point involved.

A testatrix devised real and personal property to a married woman (married at the date of the will), in fee simple. There was a power to sell for payment of debts and legacies and for the purposes of distribution.

The debts and legacies absorbed the personality and there was nothing that came to the devisee but unimproved suburban or city lots. The taxes exceeded the income. The devise which was otherwise an unrestricted devise in fee, concluded

with these words, "*free from the control of her present or future husband and without any liability for the debts, liabilities or engagements of such husband, but wholly for her own use and benefit, subject to her control.*" The will was dated February 23, 1886. The testatrix died August 16, 1888, very nearly two years and six months after the making of the will. The property had been laid out in lots for sale, and the testatrix had sold some of them.

The devisee (then a married woman), sold some of the property, and in an action for the purchase money the want of power to convey and give a good title was the sole question.

The decision was that a good title had been conveyed.

Every fact that was supposed to bear on this question has been stated. And no one can or will dispute that the point intended to be decided was that the will did not convey a separate use, but an unrestricted fee simple.

It was not intended to depart from the Pennsylvania rule that the person seized of a separate use cannot convey a title unless expressly empowered by the instrument creating the title. Nothing can be clearer than that this rule was assumed to be obligatory.

It was not intended to decide that there was a power given under which the sale was valid. The contrary is implied throughout. The power that was given was referred to, but only as bearing on the character, or rather to use correct language, the quality of the estate.

The grounds of the judgment are: 1st. The words of the will defining the estate devised, conveyed a separate use. 2d. The testatrix must be presumed to have known the value and extent of her estate at the time she made her will. But the facts thus presumed to be in her mind and that bear on the meaning of the will, are facts as they existed at the time of her death. This is shown in the case stated and in the judgment. Whether they were the same as they were when she made the will does not appear; nobody alludes to this, though it is the basis of the judgment. But it seems moderately clear that when the will was made the property which the devisee was selling at \$19,000 an acre, did not yield income

sufficient to pay taxes, much less municipal charges. And it would be unfair not to admit that the court had a right to assume that the testatrix knew when she made the will that the property that would come to her devisee, was and would be burdensome, if it was to remain unsold.

3d. The reason for the decision is that the practical result of the facts was, that there was a homestead the devisee was desired to keep up, and no income furnished for the purpose. 4th. The devise was in fee simple. 5th. There was a power to sell and give receipts for the purchase money. 6th. The circumstances surrounding the testator at the time he makes his will may be considered in construing it. 7th. A separate use means an equitable estate as distinguished from a legal estate. 8th. The incidents (*i. e.*, of a separate use) are peculiar and undesirable. 9th. It is a question of intention—the burden of showing this is on one who asserts it—it is to be ascertained from the four corners of the will, the circumstances surrounding the testator when he made it, and the condition of his estate and his family. These are three wholly distinct things, one only of which is in writing.

Hence the court is constrained to say the testatrix did not intend to create a separate use.

The court had decided that the very words used in this will did create a separate use: 131 Pa. 476. It is also admitted in the judgment that they have this meaning.

It is thus quite clear that words declaring an intention to create a separate use are not to be relied on as always sufficient for that purpose.

The conveyancer will ask what am I to inquire into when I find a will declaring that the estate of a woman married when the will was made is to be a separate use. The subjects of inquiry are stated as separately or together being sufficient to take from those words their meaning.

It may be that the reasons for an opinion or rule may, if combined, be sufficient, though each one may have little weight, but in construing words of an ordinary legal instrument, one cannot but feel his incapacity to advise or act under such a theory. It may be useful, therefore, to eliminate from the

problem as many of the nine reasons as possible. For it is assumed that any one of the reasons which are shown to have no bearing at all on the question, need not trouble the anxious man of business who only seeks to guide himself in the path prepared for him by those authorized to direct and compel.

The question being not what a word describing neither the object given nor the devisee, means in the sense of, refers or points to, but the meaning of the words of grant as describing the quantity and quality of the estate granted. The second, third, and sixth reasons consist in facts, and these facts are really comprised in one short statement—the income of property given would not pay the taxes—and what effect has this on the quantity of the estate? Such a state of facts proves a great ignorance in the testator of the business of a conveyancer, if he meant to devise a separate use, for the words creating a separate use exclude the power to sell or they mean nothing. The case of one devising land in separate use which ought to be sold because it yields no income is very common, so common that it has been provided for by general laws for the most ordinary cases, and, since 1853, for what was supposed to be all imaginable cases. Before this the Legislature was applied to. It had never been suggested that a necessity for selling had any effect to create a power or to indicate an intention to give an estate which gave the right to sell as an incident. But the books overflow with cases where this fact is no ground for the relief of creating a fee simple out of a less estate.

It may be that it is a nice distinction between evidence to identify an object or person and evidence of facts *de hors* the will to affect the meaning of the words, but one may respectfully suggest that, plain or obscure, it has been overlooked, for the two rules are in this judgment supposed to be one. That evidence is not admissible, for the later purposes by the English law needs no voucher. The point was urgently argued and decided: *Inchequin v. O'Brien*, 1 Cox, 9. Not less than five cases are cited in the note declaring that the words of the will and not the circumstances of the testator are to guide courts in their construction: 1 B. & B. 216; 3 Ves.

112; 1 Mer. 216; 1 Eden, 43; 2 Br. C. C. 297, and it is evident that this was the rule as late as 1857: *Grey v. Pearson*, 6 H. L. Cases, 106. The passage in Wigram there referred to is probably that on p. 9 on the admission of intrinsic evidence, where it is stated that evidence is never admissible *to change the meaning of the words expressed*: and this does not mean that a man can't swear to a meaning, but that no evidence of *facts* fixed and eternal or transient and fleeting written or oral, can effect the meaning of the words. The reason for the rule has been overlooked wherever this distinction has not been observed, and this has not been infrequent with us. Such evidence transfers the determination of the meaning of the document to the jury. Such is the universal rule where oral and written testimony are combined. The result is the Statute of Wills is repealed—and as these reasons may be given the go by as antique nonsense, it may be added of what possible use is the Statute of Frauds, and of what use are Deeds if this rule is to be admitted.

There is not and never was any difference between the rules for admitting evidence in the case of deeds and in the case of wills on the question of intention. The jury in ejectment always determine the applicability of the deed to the subject in dispute; but the effect of the deed or will in determining the character of the estate has never before been supposed to depend on the *res gestæ*, or the environment of the parties.

It is, however, clear that whether the distinction was overlooked or overruled, the court has decided that this kind of evidence is admissible, and that facts of this kind do serve to prove an intention to create an estate absolutely distinct and different from the one created by the words; so distinct an estate as to give a right to sell where none existed, and a right to spend the proceeds where no such right exists by virtue of the estate defined by the words of the will.

It is, of course, immaterial that our rule differs from the English rule, though it deserves notice that no one has ever ventured to declare this different result is intentional. It is quite important that the change leads to such results.

It will be found that this is the *only* ground the decision can

rest on; the other reasons do not exist. They are so utterly empty as scarcely to be capable of misleading any one.

The fourth reason is that the devise was in fee simple. There is in this a very unfortunate vagueness, and possibly there was a confusion with the thought expressed in the seventh reason. It has never been suggested that the quantity of the estate had any bearing on the intention to create a separate use; though there have been questions raised where no trustee was interposed. But, united or distinct, these facts have nothing to do with the question. I say this for it has been settled for so long, long before Pennsylvania ever heard of a separate use, that it is the merest question of curiosity, whether it ever was supposed to be otherwise, that there need not be interposed a legal estate to support the separate use or that the estate of the *cestui que* use needs to be restricted in quantity. To say that a separate use cannot be declared in favor of a devisee in fee would be precisely on the level of saying that an absolute equitable estate in one *sui juris* was not liable to be sold for the payment of his debts—it would be a mere misstatement.¹

As a matter of interest we may point out that the question whether a separate use could be created in favor of a devisee in fee was argued, decided in *Cochran v. O'Hern*, 4 W. & S. (Pa.) 95, in 1842. It was the point in the case—on the will not on the deed—which was whether there was courtesy in such an estate. It was the point argued by Messrs. McCandless & Biddle. It was decided by GRIER, P. J., below, and with a distinct knowledge of what he was doing, and in the court above. The same point had been decided as early as 1821 (*Jamison v. Brady*, 6 S. & R. Pa. 466), as a proposition requiring no further argument than that the want of a Court of Chancery did not destroy the right of a wife in whose favor the separate use had been created to protection. The right was recognized by courts

¹ Is it generally known that C. J. GIBSON says: *Nothing is more to be deprecated than the decisions that a cestui que trust can dispose of his estate.* 1 Raw. 247. He is speaking of trusts for men as well as women, and what are we to think of the mind of a judge that gravely regrets that all trust estates are not inalienable, and who evidently assumes there was a time when they were not, subject to alienation.

of law when the jurisdiction was separate: 13 C. B. 639, and in *McKenan v. Phillips*, 6 Wharton (Pa.) 571, it was said a countless train of authorities spring up to support the proposition. I very much doubt if, from the time separate uses were invented, there ever was suggested even a doubt on the point before this. In 12 Harris, 429, LOWRIE, J., says, something that might be supposed by a careless reader to mean that the separation of the legal title is necessary. But it will be found he is attempting to explain a self-evident proposition, and in doing so misstated a rule of law. There was no pretence of a separate use in the case, an unfortunate attorney was ignorant enough to think it could be created by purchasing with the wife's money. The remark does not rise to the dignity of a *dictum*. This, which is less than an *obiter dictum*, *this is the authority* relied on to support the 7th reason. In 5 Barr, 385, the precise reverse was decided and was the point of the case.

Unless, therefore, the rule *ex nihilo nihil fit* does not apply in ratiocination, it is plain reasons 4 and 7 are eliminated.

The 5th is that there was a power to sell and give receipts, but the power is restricted to sell in payment of debts and legacies and could not be exercised for the occasion never arose. And as a matter of inference it is precisely the reverse of the inference that is drawn. Powers may be used to show what estate is given, but then they are not what we call powers. They are words indicating the kind of use or enjoyment that can be made of the thing given, or defining the incidents of the estate from which the nature of the estate may be inferred; they are what are called *motives* for giving, not purposes for which the property is given. The distinction was first suggested by Sir W. Grant, 6 Ves. 249, and acted on by Sir W. Page Wood in *Saunderson's Trusts*, 3 K. & I. 507. But a power to sell and give receipts has no meaning at all if the donee of the power is also the owner, unless the legal estate is in another. Therefore, instead of proving that the words have an intention to give a beneficial fee, they imply that the testator thought she was giving an estate that could not be applied even to pay her own debts

and legacies unless a power was given. And the same remark applies to the power to sell to settle the estate.

The 8th is difficult to deal with. One asks what bearing on the meaning of the words defining an estate has the fact that the incidents of the estate thus created are *peculiar* and *undesirable*. Peculiarity of incident, is the creation of the law. It is impossible to conceive of this as tending to change the meaning of words given by the law itself. It is a mere contradiction. The *undesirability* of the incidents is a good reason for changing them or destroying the estate that had the incident, as was done with estates tail. But when we remember that these incidents are solely the creations of the court, and this particular one the most sedulously cherished and proclaimed as the product of the superior wisdom of our courts over the English Chancellors, it seems difficult to conceive that these can either, separate or combined, be a reason for affecting a change in the meaning of the words defining the estate.

The 9th, viz., that it is a matter of intention no one disputes. The decision, therefore, is that the *intention* as to the quantity or quality of the estate granted, is to be ascertained from facts outside the will, and not from the words defining the estate, and these facts can suffice to vary the written description of the estate in the will; the facts being that a power of sale is required for the enjoyment of an income for maintenance, and that without such a power the devise is a burden.

This is a rule under which conveyancers must practice. A Brief of Title will hereafter contain a statement of the character of the property and its capacity of being utilized without a sale, as determining the nature of the estate. It is not in the will we are to look for a definition of the estate.

The testatrix (presumably knowing the law) selected words disabling her devisee from selling, and gave no power to sell; how does this tend to show she did not mean to disable her, but that she meant the exact reverse. Would it not be well to ascertain what these aphorisms mean, or to stop using them?

Now, the constant reiteration of phrases like this, really misleads ; the will means what it says, and no one ought ask or care if the testator did, or did not, intend it. The statute forbids the ascertaining his intention in any other way *than by a writing signed*, and here it is, quite plain that the words used have no meaning or effect, except to exclude the right to sell or deal as owner. The husband's rights are excluded, and so are those of his creditors. A clause is, therefore, struck out, because, if it operates, the property costs more than can be got from it by renting. This is certainly the new rule by which to construe a will, though reduced in bulk, and with the fog of words dispersed.

Two things are perfectly clear. The testatrix could not have really known the state of the law, or the meaning of the words she used, or she was very foolish, if not cruel. But these facts are absolutely immaterial. She did what thousands have done ; she omitted to give a power, probably not knowing it was needed. Before 1853, we applied to the Legislature. *Norris v. Clymer*, 2 Barr., shows that no one supposed that facts such as existed here affected the meaning of the will, or enlarged or altered an estate, or even confined a power. The Price Act of 1853, has no excuse for existence, except the existence of facts like those which have now become the chief factors to determine the meaning of the words of a will as to the quality of the estate. Not what thing was meant by a word, but what a thing is, that can be created only by words, *i. e.*, the definition of words, and those purely technical words.

Another change has been made that seems to have been overlooked. The testatrix used words that meant three things, that is, effected three consequences. They meant that the devisee cannot sell, she cannot devise, and her husband cannot have any interest in the thing devised. Yet, though using these words with a knowledge of the state of her property, that knowledge makes them mean that the devisee may sell and spend the money, and she may devise, and the husband will be tenant by the courtesy if the land is not sold; if it is, he will own a third, or a half of the proceeds, if they are not squandered.

If all this has been affected by overlooking so commonplace a rule of evidence as that which prohibits the *meaning of the words* of a will (not their application to a subject), to be affected by parol or by facts, *dehors* the will, it is quite impossible to say where the effect of the judgment will end, for it covers all documents under which property is transferred, whether deeds, wills, or contracts.

Does not the decision deserve the study of all conveyancers. And is it indecorous to endeavor to attract that attention and endeavor to make the point clear?

There are two points for criticism on this judgment. 1st. The evidence was inadmissible for the purpose to which it has been applied. The citation of the authority may seem a mere impertinence, for what authority can equal that of the Supreme Court? But it is not an authority for a legal dogma which might have been stated the other way. The authority is merely the explanation, or rather the application of a statute, and one that cannot be over-estimated in importance. The will must be in writing, and *no external evidence can be admitted to prove the meaning of the words*, because the statute requires it to be in writing. If facts *dehors* the will can give a meaning to the words, the will is no longer in writing, it is partly in writing, and partly in the facts. The rule as stated in the judgment, criticised, is the same in England as here; the mistake was in supposing it to be a universal proposition, a mistake of logic which seems to be inherent in the American mind; probably from the contempt for scholastic training which we see and hear on all sides.

2d. The evidence, if permitted to be read, had no tendency to *prove the point for which it was used*. It certainly proves either great folly or absolute ignorance, or something worse in the testatrix; if it proved her intention as to the kind of estate she meant to give, that is one that her devisee could sell and convey, it proved a mistake was made in writing the will. But no one can possibly assert that an intention, if proved or admitted, tends in the slightest degree to change the meaning of the deed or document. It may authorize a reformation, and the fact that such a jurisdiction is ever exercised, proves

that the meaning is not changed, but that the reverse is true. But this reformation is not permitted in wills; not because they are more sacred than any other paper, but because the statute requires them to be in writing and signed at the end; if they are not signed, the property by law belongs to the heir or next of kin, and *the power to divest that title has not been well executed*. This doctrine is obscured by the mode of stating it copied from Lord COKE. It is by him stated as if it were the fondness of the law for the heir. Whereas, it should be stated as a power given by law to take from the heir, provided it is done in a certain way.

The way to test this, is to assume that instructions in writing signed by the testator were to give an estate that would at the same time enable the devisee to sell and use the money but also confer a separate use. Then, that the will was written in these words, and the testatrix assured this would have the effect she desired. No one would, or could then dispute that the conveyancer had blundered; no one would attempt to argue that the meaning of the will was changed, or that the instructions could be used to construe the will. It may be that it is better to let in the evidence and go to a jury on the meaning of wills. But the alternative is either this or the English rule, which till now, we have always supposed was the same as ours. And certainly no one desires or intends anything so absurd as to change the rule.

Probably the question of the admission of evidence turns on the meaning of *sensible*. If that has the meaning that it has in characterizing a will as a sensible will, when conversing about a friends will, the court was right in looking at the evidence to ascertain that it was a very foolish will, and of what importance is that fact? But if by sensible is meant capable of operation, though producing unfortunate and probably unforeseen results, which is the legal meaning of the word, the evidence, if admissible, had no bearing on the will.

Oxenden *v.* Chichester, 4 Dow, 65, decides that if there be a thing answering the words used to describe it in a devise, no evidence is admissible that the testator intended something else to form part of that thing for the purpose of the devise.

As there is no power to vary a principle once decided in the House of Lords saving by Act of Parliament, and it is absolutely immaterial whether the decision is right or wrong, we may be quite certain that this is still the rule in that country. And, therefore, when they use the same words as we do as to the admissibility of evidence, they do not mean that you can change the meaning of the words by any facts, if those words can mean what they express when applied to things as they are. Has any one ever pretended or imagined that the canon of evidence had a different meaning on the opposite sides of the Atlantic.